Supreme Court, U.S.
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No. 99-639

In The
Supreme Court of the United States
October Term, 1999

CIRCLE INDUSTRIES USA, INC.,
Petitioner,

v.

PARKE CONSTRUCTION GROUP, INCORPORATED,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RULE 29.6 STATEMENT

Petitioner, Circle Industries USA, Inc., does not have a parent corporation or a publicly held company that owns 10% or more of its stock.

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REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MISSTATEMENT OF FACTS

The Statement of Facts contained in pages 4 through 7 of The Respondent's Brief In Opposition To Petition For Writ Of Certiorari contains unreferenced allegations that are at odds with the facts, as set forth in the opinion of the United States Court of Appeals for the Second Circuit.

Respondent, Parke Construction Group, Incorporated (Parke), alleges that, "The arbitrator took possession of these exhibits ...." (p.4 of Parke's Brief In Opposition). Yet, it is clear that the arbitrator never took possession of the exhibits, as they were lost by the American Arbitration Association. The Second Circuit stated that, "On April 14, 1997, an AAA administrator contacted counsel for the parties to request duplicate copies of the exhibits, explaining that the AAA could not locate the original exhibits." (A4 of the appendix to Petitioner's Petition For A Writ Of Certiorari).

Parke next claims that "The arbitrator reviewed each exhibit ...." (p.4). The Second Circuit determined that "The arbitrator reviewed some of the exhibits as they came into evidence and glanced cursorily at others." (A3-A4).

Parke summarizes the evidence regarding Parke's principal place of business.

> "Circle's contention that Parke's principal place of business was in New York was based upon the hearsay statements from unidentified individuals that Parke's mail was being forwarded to its president, John Bowe, in New York and that certain settlement negotiations regarding other disputes arising from the Joint Venture's projects had taken place in New York. In his responsive declaration, Mr. Bowe explained that the New York address mentioned in Circle's papers was for another corporation

> which he owned, which had no other affiliation with Parke and that the settlement negotiations in question had in fact been conducted in Georgia. Mr. Bowe also explained that Parke's business had only been conducted in Georgia." (p.6-p.7).

This supposed summary ignores the Second Circuit's view of the facts.

> "Between 1993 and the fall of 1995, Parke's registered office was located in Georgia and its registered agent, Greg Lubonty, resided there. In the spring of 1995, the parties agreed to phase out the joint venture, and Parke performed its last construction work in Georgia in the fall of 1995. Parke also closed its office in Georgia at that time. The corporation's registered agent, Lubonty, then left the state, and all mail addressed to Park was forwarded to Parke's president, John Bowe, in New York. Parke's activity since late 1995 has been limited to collecting its various accounts in Georgia and prosecuting this action in New York." (A3).

CIRCLE COULD PREVAIL UNDER A DIFFERENT TEST

Parke suggests that Petitioner, Circle Industries U.S.A., Inc., (Circle), "would still lose" regardless of the Supreme Court's resolution. This is incorrect. Circle would not prevail only under the Third Circuit's test in *Mid Atlantic National Bank v. Hansen*, 48 F.3d 693, 696 (3rd Cir. 1995). The Third Circuit's view is that an inactive corporation has no principal place of business. Circle could prevail under the "facts-and-circumstances test" of either the Fourth or Fifth Circuits. In *Athena Automotive Incorporated v. DiGregorio*, 166 F.3d 288 (4th Cir. 1999), the Fourth Circuit stated,

> "A corporation's business does not usually end

> with the abruptness of closing its doors. Even when a corporation has ceased all operations and has become inactive, the continuing impact of its business in a given locale could linger on to an extent sufficient to give it a geographic identity there as its principal place of business. Indeed, a corporation's winding up of its business affairs may well constitute a significant activity and consume a considerable period of time." 166 F.3d 288, 291.

The Court then concluded that if it had to find a principal place of business for the corporation in that case, it would choose the state from which the corporation was conducting the litigation, a this was virtually its only activity.

> "While Athena Automotive was unquestionably a citizen of Georgia, its state of incorporation, see 28 U.S.C. s 1332(c)(1), whether it also actually had a place of business at the commencement of this action is not a matter that we need to decide, since it did not have its principal place of business in Maryland. Because the defendants were Maryland citizens and Athena Automotive was not a Maryland citizen and was at least a Georgia citizen, complete diversity therefore existed. If, however, we were required to find a principal place of business for applying § 1332, we might, by applying our "nerve center test," conclude that Athena Automotive's only business was to pursue this litigation, an activity that was being conducted from Fairfax, Virginia." 166 F.3d 288, 292.

The Fourth and Fifth Circuits, see *Harris v. Black Clawson Co.*, 961 F.2d 547, 551 (5th Cir. 1992), regard the winding up activities of an inactive corporation as a relevant factor in determining if the inactive corporation has a local presence in a given locale. The Fourth and Fifth Circuits

examine the period of the inactivity as a relevant factor. The Fourth and Fifth Circuits consider the conduct and direction of litigation as a relevant factor. In other words, in the instant matter, if had been decided by the Fourth Circuit and possibly also by the Fifth Circuit, rather than the Second Circuit, the Court would have reversed the District Court on the remand issue.

Parke's major activity is conducting this law suit against Circle. The litigation is being conducted from New York. Circle could prevail under the Fourth or Fifth Circuit's view. In fact, Circle could prevail even under the Second Circuit's view, provided that its test did not include the rule of *Wm. Passalacqua Builders, Inc. v. Resnick Developers South, Inc.*, 933 F.2d 131 (2nd Cir. 1991), that conducting a law suit does not qualify as "transacting business" for jurisdictional purposes, see 933 F.2d at 131, 141.

CONCLUSION

Parke's presentation of the facts in its Brief In Opposition is flawed and should not be relied upon. Its position that Circle can not prevail is also flawed.

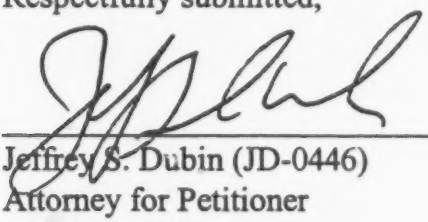
This case presents a question of importance, whether an inactive corporation, whose only activity is engaging in a law suit, has a principal place of business in the state from which it is prosecuting that law suit. This case presents an opportunity for this Court to resolve a conflict involving four Courts of Appeals holding three different positions.

If the petition is granted, this Court can correct the errors that allowed this case to remain in the federal court system when all the parties were actually citizens of New York. This Court can direct that this case be remanded to the Supreme Court of the State of New York, County of Nassau.

Circle Industries USA, Inc., respectfully requests that its petition for a writ of certiorari be granted.

Dated: Huntington, New York
November 11, 1999

Respectfully submitted,



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